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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

# SUMMARY RECORD OF THE 498th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 7 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 9

1. Mr. SAHAYDACHNY (Secretariat) said that article 9 constituted a generic provision on the required form of communication between the procuring entity and the supplier or contractor. During the preparatory work of the Working Group, a consensus had emerged that the Model Law should facilitate the use of electronic data interchange (EDI), and the Secretariat had initially hoped that article 9 might also serve as an enabling provision in that regard. However, that hope had not been fulfilled.

2. Documents (conference room papers) A/CN.9/XXVI/CRP.2 and CRP.3, which would be available in all languages in due course, contained specific proposals for additional provisions to facilitate the use of EDI.

3. As it stood, paragraph (1) set forth a requirement that communications must be in a form that provided a record - not necessarily written - of their content; it also stipulated that that form was subject to other provisions of the law. The only provision in the existing text of the Model Law that conflicted with article 9 was the one in article 25 (5), which required that tenders be submitted in writing and in a sealed envelope. The implications of the decision of the Working Group with regard to article 25 (5) could be considered in greater detail during discussion of the proposals contained in documents A/CN.9/XXVI/CRP.2 and CRP.3.

4. He drew attention to a typographical error in the text of paragraph (2): the reference to article 11 (3) should be replaced by a reference to article 18 (3). In addition, the Commission might wish to consider the wisdom of retaining the reference, in the same paragraph, to article 32 (1), since the Model Law would then permit acceptance of a tender to be communicated initially by telephone.

5. Mr. HERRMANN (Secretary of the Commission) said that the key phrase in the wording of article 9 (1) was "a form that provides a record of the content of the communication". There was general agreement that the substantively identical wordings used in other model laws, such as the Model Law on International Commercial Arbitration, should be interpreted as applying to EDI and that only purely oral communications, whether direct or by telephone, were excluded. He urged the Commission, in the interests of consistency, to consider the proposed wording of article 9 (1) in the light of that interpretation.

6. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he had difficulty in understanding the first paragraph of article 9 and would therefore submit his own proposed version of that paragraph to the drafting group.

7. Mr. LEVY (Canada) said that his delegation's proposals (contained in document A/CN.9/XXVI/CRP.3) for amending articles 9 (1) and 25 (5) so as to provide for the use of EDI were based on an interpretation that fully coincided with the interpretation just referred to by the Secretary of the Commission.

8. Noting that the United States delegation was also submitting a proposal relating to EDI, he said that the Canadian delegation was not wedded to any particular form of words in its endeavour to secure the end that both delegations desired. The overriding concern was to ensure that, where EDI was available, its use should be permitted and that, where it was not available, its absence should not constitute an impediment to submitting or receiving tenders.

9. Mr. WALLACE (United States of America), noting that, like the delegation of Canada, his delegation was not wedded to any particular form of words, said that many countries currently lacked EDI facilities and that, given the difficulties associated with issues such as confidentiality and authenticity, caution would have to be exercised if conversion of the procurement process from a paper-based to an electronics-based system was envisaged.

10. Perhaps the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement, for consideration by the Commission at its next session along with the question of the procurement of services. In the paper, the Secretariat might address such questions as how to ensure confidentiality, how to solve problems of authentication, how to educate people in the workings of EDI in the procurement field and how to convince legislatures that the risks involved in the use of EDI were not too great.

11. Mr. ANDERSEN (Denmark), expressing strong support for the principle underlying article 9, said that the Commission, which should stick to the conclusion that it had reached some years before about the legal value of computer records, should ensure that the principle was not undermined.

12. Many problems associated with matters such as confidentiality and authentication would undoubtedly be resolved by technical means or by legislation other than laws based on the Model Law. He accordingly wished to endorse article 9 as it stood and to caution against raising problems that could be resolved in the practical world.

13. The CHAIRMAN proposed that the discussion on article 9 be suspended until documents A/CN.9/XXVI/CRP.2 and CRP.3 were available in all of the Commission's working languages.

Article 10

14. Mr. SAHAYDACHNY (Secretariat) said that earlier versions of the article had spelled out detailed requirements, the aim being to harmonize the relevant legalization laws of different States. Ultimately, however, the Working Group had decided that it should not attempt to harmonize such laws, but rather to ensure that they were not used for stifling competition, in particular through discrimination against foreign suppliers and contractors, and it had agreed on the principle that no legalization requirements should be imposed in procurement proceedings that were not imposed for the same types of documents in a general context.

15. Mr. WALLACE (United States of America) said he found article 10 entirely satisfactory.

16. Mr. KOMAROV (Russian Federation) said that there were international treaties which established simpler requirements for the legalization of documentary evidence than those established by the national legislation of many States. Perhaps one should provide in article 10 for legalization requirements to be determined not only by the legislation of a given State but also by relevant international treaties.

17. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 10 was an excellent means for precluding the imposition of excessive legalization requirements, but should also contain a provision enabling suppliers or contractors (especially those awarded contracts) to correct defects of form which were relevant from the point of view of legalization. Some might think that the point was implicitly covered by article 6 (7), but he believed it should be covered explicitly in article 10.

18. Mr. JAMES (United Kingdom) considered that the best place to cover the point raised by the observer for the Inter-American Development Bank was in the Guide to Enactment.

19. Regarding the important point raised by the representative of the Russian Federation, if the laws of a State reflected that State's obligations pursuant to an international treaty, the legalization requirements in that State would differ from those in a State not party to that treaty. The point was probably one of interpretation and could also be dealt with in the Guide to Enactment.

20. Mr. MORAN BOVIO (Spain) agreed with the representative of the United Kingdom that the points raised by the representative of the Russian Federation and the observer for the Inter-American Development Bank could be covered in the Guide to Enactment.

21. Mr. TUVAYANOND (Thailand), noting that article 10 referred to "the laws of this State", said that there were sometimes regulations and practices not specified in the laws of a State and that it might be necessary to add the word "regulations" to the word "laws".

22. The point raised by the representative of the Russian Federation was not, in his opinion, simply one of interpretation. Perhaps the wording of article 10 should take that point into account.

23. Mr. PEREZNIETO CASTRO (Mexico) suggested that the Guide to Enactment mention the international (including inter-American) treaties concerning the legalization of documentary evidence.

24. Mr. WALLACE (United States of America), noting that the question of international treaty obligations was covered in article 3, said that the drafting group should perhaps consider the point raised by the representative of the Russian Federation - and also the point raised by the representative of Thailand.

25. Mr. LEVY (Canada) said, with regard to the point raised by the representative of Thailand, that article 10 referred to requirements "provided for in the laws of this State" and that, as far as he was concerned, laws included regulations. He did not think that article 10 as it stood would give rise to any problems in common law jurisdiction, and probably not in civil law jurisdiction either. Besides, references to regulations in conjunction with laws in some cases and not in others might lead to problems of interpretation.

26. The representative of Thailand had also referred to "practices". As practices sometimes arose independently of the law, he would prefer it if there were no reference to practices in article 10.

27. With regard to the point raised by the representative of the Russian Federation, if a State became party to an international treaty, its laws should be brought into conformity with it. If they were not, that State was in breach of its international treaty obligations. The Model Law should be based on the assumption that the laws of the State were in conformity with such obligations.

28. Mr. TUVAYANOND (Thailand), noting that he hoped the drafting group would consider the point raised by him, said that the Model Law should reflect the fact that some countries, especially developing countries, implemented international treaty obligations without any implementing legislation - on the basis of practices. Unless the Model Law reflected that fact, such countries might find it difficult to enact it.

29. Mr. KOMAROV (Russian Federation) said that, after listening to the discussion, he was more convinced than ever that the point which he had raised should be covered - either in the Guide to Enactment or in the Model Law itself. A situation could arise where suppliers or contractors based in countries parties to international treaties providing for more lenient legalization requirements had an advantage over suppliers or contractors based in other countries and hence subject to more stringent requirements.

30. Mr. HERRMANN (Secretary of the Commission) said that, as he understood it, the representative of the Russian Federation had raised an important question - namely, should the Model Law ensure that there was no discrimination between tenders from suppliers or contractors based in countries which had acceded to treaties providing for less stringent legalization requirements and tenders from suppliers or contractors based in countries not bound by such treaties? That question was a complex one which could not be dealt with simply by inserting a remark in the Guide to Enactment.

31. Mr. KOMAROV (Russian Federation) said that the understanding of the Secretary of the Commission was correct.

32. Mr. RAO (India), recalling the Canadian representative's remark that, as far as he was concerned, laws included regulations, said that was not necessarily the case in his own country, where administrative regulations did not have the character of law. He therefore felt that explicit reference should be made to regulations in article 10.

33. Mr. PEREZNIETO CASTRO (Mexico) said that the discussion gave the impression that the Commission was developing an international treaty rather than a model law. He failed to see where the difficulties - if any - lay.

34. THE CHAIRMAN said the Commission had to decide whether to make provision in article 10 for equal treatment as between suppliers or contractors based in States with lenient legalization procedures and suppliers or contractors based in other States. Speaking in his personal capacity, he would suggest that article 10 not be amended for that purpose.

35. With regard to the question of regulations, he felt it should be dealt with in the Guide to Enactment.

36. Mr. LEVY (Canada), agreeing with the Chairman's remarks concerning the question of regulations, said that, in his opinion, the Commission should not try to eliminate differences arising from international treaties; it might otherwise be seen as acting presumptiously, and the endeavour might give rise to difficulties. He believed that article 10 should be left unchanged.

37. Mr. WALLACE (United States of America) supported that view, but agreed with the Secretary that the representative of the Russian Federation had raised an important question; the existence of international treaty obligations might well lead to discrimination in favour of certain suppliers or contractors, which would conflict with one of the main objectives of the Model Law. The attention of legislators should be drawn to the question in the Guide to Enactment.

38. The CHAIRMAN said he took it to be the wish of the Commission to include in the Guide to Enactment a statement to the effect that, where laws were mentioned, regulations were also implied and also a statement drawing attention to the question just referred to; article 10 could then be adopted unchanged.

39. It was so decided.

Article 11

40. Mr. HERRMANN (Secretary of the Commission), drawing attention to amendments proposed by the Secretariat in document A/CN.9/377, said the purpose of the article was to establish the requirement that the procuring entity prepare and maintain a record of all major actions and decisions taken in the course of the procurement proceedings. The Working Group had regarded that requirement as one of the main pillars of the type of procurement system envisaged under the Model Law and as an essential element in trying to ensure transparency and the accountability of the procurement entity to taxpayers, administrative oversight bodies and legislatures.

41. The Working Group had thought it useful, for purposes of clarity, to list under a single heading all the kinds of information that should be contained in the record - even those which were already referred to in other parts of the text.

(Mr. Herrmann, Secretary of the Commission)

42. Paragraphs (2) and (3) of the article dealt with the question of the extent to which the record should be made available for examination, to whom and when. The Working Group's view had been that it would not be appropriate for the Model Law to provide for complete disclosure of the record to anyone on request, as provided for in some States by freedom of information acts, but rather that the Model Law should provide for disclosure to the extent necessary if the record was to fulfil its function of ensuring transparency and the right of aggrieved suppliers and contractors to seek review.

43. The Working Group had thought it important that a portion of the record should be available for examination by suppliers and contractors so that they could find out whether they had been treated fairly or whether they had grounds for seeking review, and provision for such examination was made in paragraph (3). Of course, the provisions regarding disclosure could be overriden by the orders of a competent court.

44. Lastly, the article provided that failure by the procuring entity to prepare a record would not give rise to liability for monetary damages.

45. Ms. ZIMMERMAN (Canada), referring to her Government's comments in document A/CN.9/376/Add.1, said that in some countries the procuring entity acted on behalf of client departments which prepared the record, which was then maintained by the procuring entity. In order to accommodate that situation, she suggested that the word "maintain" be substituted for "prepare" in the first line of paragraph (1).

46. With regard to subparagraph (1) (k), she suggested that the drafting group consider replacing the word "grounds" by the phrase "grounds and circumstances", which had been used in other contexts.

47. Mr. KLEIN (Observer for the Inter-American Development Bank) pointed out that countries might wish to add other kinds of information to those listed in paragraph (1). He therefore suggested that the words "at least" be inserted after the word "containing" in the second line.

48. Mr. WALLACE (United States of America) endorsed the last two suggestions.

49. Mr. JAMES (United Kingdom) supported the replacement of "grounds" by "grounds and circumstances" in subparagraph (1) (k).

50. The CHAIRMAN said he took it that the Commission wished to replace the word "grounds" by the phrase "grounds and circumstances" in subparagraph (1) (k).

51. It was so decided.

52. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. KLEIN (Observer for the Inter-American Development Bank), suggested that, rather than substituting "maintain" for "prepare" at the beginning of paragraph (1), the Commission use both words, so that the paragraph would read "prepare and maintain".

53. Ms. ZIMMERMAN (Canada) said that the suggestion made by the representative of Mexico would not meet her delegation's concerns.

54. Mr. TUVAYANOND (Thailand) suggested that "prepare" be replaced by "keep" rather than "maintain".

55. Mr. JAMES (United Kingdom), supporting that suggestion, said that the matter should perhaps be referred to the drafting group.

56. Mr. RAO (India) said that the essential question was not who prepared and maintained the record, but accessibility of the record for suppliers and contractors. Their interests required simply that the record be maintained.

57. The CHAIRMAN said he took it that the Commission wished to delete the word "prepare" in the first line of paragraph (1) and replace it by "maintain" or "keep", the choice being left to the drafting group.

58. It was so decided.

59. Mr. MORAN BOVIO (Spain) supported the idea - put forward by the Observer for the Inter-American Development Bank - that the words "at least" should be inserted after the word "containing" and said that their insertion would underline the fact that one was thinking in terms of minimum requirements.

60. Mr. PEREZNIETO CASTRO (Mexico), also supporting the idea, said that one should not view the Model Law in general as setting minimum requirements. The important thing was uniformity and harmonization, with potential suppliers or contractors participating in procurement proceedings on the basis of certainty that there were no requirements over and above those laid down in the Model Law.

61. The CHAIRMAN said he took it that the Commission wished to adopt the amendment suggested by the observer for the Inter-American Development Bank.

62. It was so decided.

63. The CHAIRMAN invited the Commission to consider the proposal by the Secretariat, made in document A/CN.9/377, that the required content of the record also include a summary of requests for clarifications and of the corresponding clarifications. If the proposal was acceptable, a subparagraph (1) could be added to article 11 (1).

64. Mr. SAHAYDACHNY (Secretariat) explained that such a summary was needed so that suppliers or contractors could discover whether or not they had received responses to requests for clarification made by other suppliers or contractors - in other words, whether or not the procuring entity had complied with the requirement to circulate such responses.

65. Mr. TUVAYANOND (Thailand) said that, in his opinion, the matter was already dealt with in paragraph (4) of article 7.

66. Mr. SAHAYDACHNY (Secretariat) said that the purpose of the Secretariat's proposal was to provide a backstop to paragraph (4) of article 7.

67. Mr. WALLACE (United States of America) commended the proposal in principle, but said that, since the procurement process was often very long and could involve very many requests for clarifications, there was a need to specify exactly what kinds of information should be covered in the summary.

68. Mr. LEVY (Canada) suggested that the scope of the summary could be made clear by referring in additional subparagraph (1) to paragraph (4) of article 7 and to article 23.

69. Mr. TUVAYANOND (Thailand) pointed out that in two places in article 11 (1) the phrase "suppliers and contractors" was used, but elsewhere the reference was generally to "suppliers or contractors". Was that intentional, and if so what was the rationale?

70. The CHAIRMAN suggested that the question be referred to the drafting group and said he took it that the Commission wished to adopt the Secretariat's proposal for an additional subparagraph (subparagraph (1)), with the references suggested by the representative of Canada.

71. It was so decided.

72. The CHAIRMAN took it that the Commission wished to adopt article 11 (1) as amended.

73. It was so decided.

74. The CHAIRMAN said he took it that the Commission wished to adopt article 11 (2) as submitted by the Working Group in the annex to document A/CN.9/371.

75. It was so decided.

76. The CHAIRMAN invited the Commission to consider article 11 (3).

77. Mr. SAHAYDACHNY (Secretariat) drew the attention of the Commission to the two amendments to article 11 (3) proposed by the Secretariat in document A/CN.9/377, where the reference to article 11 (3) (f) and (g) should read article 11 (1) (f) and (g).

78. Ms. ZIMMERMAN (Canada) had no difficulties with the proposed amendments, but suggested that "other than" would be preferable to "beyond"; perhaps the drafting group could consider the matter.

79. Also, referring to the comments of her Government in document A/CN.9/376/Add.1, she proposed that paragraph (3) provide that relevant portions of records be made available "to" rather than "for inspection by" suppliers and subcontractors.

80. Mr. TUVAYANOND (Thailand), referring to the words "the procuring entity shall not disclose", asked why there should be an obligation - rather than a right - not to disclose information of the kind referred to in subparagraphs (3) (a) and (b). Also, he wondered whether the paragraph should not include provisions regarding non-disclosure on national security grounds.

(Mr. Tuvayanond, Thailand)

In addition, he wondered whether there might not be contradiction between subparagraph (3) (b), concerning information that should not be disclosed, and subparagraph (1) (e), concerning information that should be included in the record of the procurement proceedings.

The meeting rose at 12.35 p.m.